COURT FILE NUMBER	1501-11817
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	EASY LOAN CORPORATION and MIKE TERRIGNO
DEFENDANTS	BASE MORTGAGE & INVESTMENTS LTD., BASE FINANCE LTD., ARNOLD BREITKREUTZ, SUSAN BREITKREUTZ, SUSAN WAY and GP ENERGY INC.
DOCUMENT	**BENCH BRIEF OF THE RECEIVER FOR AN APPLICATION TO BE HEARD BY JUSTICE B.E.C. ROMAINE AT 2:00 P.M. ON APRIL 2, 2019**

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MAR 20 2019
JUDICIAL CENTRE OF CALGARY

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PART I - INTRODUCTION

1. This Bench Brief is submitted on behalf of BDO Canada Limited, in its capacity as Court-appointed receiver (the "**Receiver**") of Base Mortgage & Investments Ltd. ("**Base Mortgage**") and Base Finance Ltd. ("**Base Finance**", and together with Base Mortgage, the "**Debtors**") in support of its Application returnable at 2:00 p.m. on April 2, 2019 (the "**Application**").[1] Of the relief sought by the Receiver in the Application, this Bench Brief addresses the following three issues:

(a) Whether this Court should declare that any applicable limitation period under the *Limitations Act*[2] to seek judgment against the Net Winners, for having received fraudulent preferences (the "**Clawback Judgments**"), and in accordance with a procedure established by this Court in the within Application, has not commenced and has not expired (the "**Limitations Issue**");

(b) Whether this Court should grant leave to the Receiver: (i) to make the Titan Order Application to obtain judgment against some or all of the Net Winners disclosed by the Clawback Calculation; or (ii) in the alternative, to commence one or more Enforcement Actions in a Court of competent jurisdiction against some or all of the Net Winners (the "**Enforcement Procedure Issue**"); and

(c) Whether this Court should declare that, subject to further Order of this Court, including an Order discharging the Receiver, any actions against any Net Winners

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[1] All capitalized terms used but not otherwise defined herein have the meanings assigned to them in the Application.

[2] *Limitations Act*, RSA 2000, c L-12 (the "***Limitations Act***") **[Tab A]**.

in the within receivership proceeding, pursuant to the *Fraudulent Preferences Act*,[3] or otherwise, are actions which can be advanced only by the Receiver, and therefore, neither a Titan Order Application nor any Enforcement Actions may be commenced by any person other than the Receiver except with leave of this Court (the "**Exclusive Enforcement Issue**").

PART II - LAW AND ARGUMENT

A. The Limitations Issue

(a) Overview

2. The Receiver raises the Limitations Issue at this time to obtain certainty before embarking on a process which will incur the significant costs of performing the Clawback Calculation and running a claims process and recovery process related to any Clawback Judgments. Four investors in the Ponzi scheme operated by the Debtors have alleged (in an action filed against the Receiver without leave of this Court) that the Receiver is statute-barred from pursuing the Net Winners to recover funds for the benefit of all of the estate's creditors,[4] a position with which the Receiver disagrees.[5] Amongst other things, the identities of the "Net Winners" and the amount of whose "winnings" are currently unknown to the Receiver. As the Limitations Issue will significantly affect the future administration of this estate, it would be appropriate for

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3 *Fraudulent Preferences Act*, RSA 2000, c F-24 (the "***Fraudulent Preferences Act***") **[Tab B]**.

4 Seventh Report of the Receiver, dated January 14, 2019, at para 83(d) (the "**Seventh Report**"); Eighth Report of the Receiver, dated March 7, 2019, Exhibit 4 (the "**Eighth Report**").

5 It should be noted that the action against the Receiver has four named Plaintiffs. However, two of those Plaintiffs are Mr. Mike Terrigno and his company, Easy Loan Corporation. Moreover, Receiver's counsel has been advised that this Statement of Claim was drafted by Mr. Terrigno, and that the Statement of Claim was filed and is being managed by Mr. Terrigno. As such, for reference purposes this action will be called the "**Terrigno Receiver Action**" in this Brief of Argument.

this Court to consider the Limitations Issue at this time and declare that no relevant limitation period under the *Limitations Act* regarding the Clawback Judgments has commenced or expired.

3. The Receiver advances two main bases for its contention that no limitation period under the *Limitations Act* regarding the Clawback Judgments can have commenced or expired.

4. First, the *Limitations Act* can only apply when a "remedial order" is sought and the Clawback Judgments would not constitute "remedial orders" within the meaning of the *Limitations Act*. A remedial order is, subject to certain express exclusions, an order "requiring a defendant to comply with a duty or pay damages for the violation of a right". The definition of "remedial order" explicitly excludes "declarations of rights and duties, legal relations or personal status" and the "enforcement of a remedial order". The Clawback Judgments, if granted, would not be based on any assertion that the Net Winners have failed to comply with any duty or that they are to pay damages based on a violation of a right. For that reason alone, the Clawback Judgments cannot be "remedial orders". In any event, the Clawback Judgments would settle the respective property rights as between the Debtors' estate and the recipients of what appear to be fraudulent preferences under the *Fraudulent Preferences Act*, for the purpose of enforcing the Receivership Order, and are therefore expressly excluded from the definition of "remedial order" as declarations and as the enforcement of a remedial order. Accordingly, the Clawback Judgments are outside the scope of the *Limitations Act* and no limitation period thereunder could have commenced or expired.

5. Second, and in the alternative, if the Clawback Judgments are within the scope of the *Limitations Act*, no relevant limitation period has commenced, much less expired. The limitation period under section 3(1)(a) of the *Limitations Act* can only commence when three conditions have been met, two of those conditions being that the claimant knows, or ought to know: (i) that the injury is attributable to the conduct of the defendant; and (ii) that the injury warrants

bringing a proceeding. At this time, the identity of the defendants is still unknown and will not be known until the Clawback Calculation is completed. Similarly, the Clawback Calculation must be completed to know whether the injury warrants bringing a proceeding. Therefore, the limitation period under section 3(1)(a) of the *Limitations Act* cannot have commenced, much less expired.

(b) The *Limitations Act* is Inapplicable to the Clawback Judgments

6. The *Limitations Act* is not intended to apply to any situation where the Court's authority is invoked, but only where a "remedial order" is sought. According to section 2 of the *Limitations Act*, that Act applies "where a claimant seeks a remedial order" in a proceeding commenced after March 1, 1999.

7. Section 1(i) of the *Limitations Act* defines a "remedial order" as follows:

> **1** In this Act,
>
> …
>
> (i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes
>
> (i) a declaration of rights and duties, legal relations or personal status,
>
> (ii) the enforcement of a remedial order, …

8. An essential feature of a "remedial order" is that the order must enforce "a duty owed by a defendant in respect of a right of the claimant."[6] Appellate authority indicates that an action based on a fraudulent preference does not fall within this definition. The Ontario Court of

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[6] *Limitations, Final Report No 55*, Alberta Law Reform Institute (Edmonton: December 1989), at 52 (the "**ALRI Limitations Report**") **[Tab C]**. The ALRI Limitations Report has been relied upon by the Alberta Court of Appeal: see, *e.g.*: *Bowes v Edmonton (City of)*, 2007 ABCA 347 at paras 139, 143-44 ("***Bowes***") **[Tab D]**.

Appeal, in *Perry, Farley & Onyschuk*, provided the following guidance regarding the provision of an Ontario statute that is analogous to the relevant provisions of the *Fraudulent Preferences Act*:[7]

> This provision neither creates a right of action that sounds in damages, nor does it create a legal duty, the breach of which gives rise to a cause of action. The plaintiff in a fraudulent conveyance action does not assert the breach of a legal duty, but rather asserts that the debtor has improperly placed assets beyond the reach of ordinary legal process. Any entitlement to the payment of money or damages in favour of plaintiff exists independently and apart from the action to set aside the fraudulent conveyance. The Act gives no right of damages nor compensation for loss. It provides for a declaratory type proceeding that has the effect of nullifying transfers and conveyances of the debtor's property so as to make possible execution of the creditor's debt. …

9. In *Perry, Farley & Onyschuk*, the Ontario Court of Appeal held that the Ontario limitations statute did not apply to fraudulent conveyances. Similarly, in *Milavsky*, the Alberta Court of Appeal cited *Perry, Farley & Onyschuk* as authority to distinguish the case before it (where a defendant asserted a limitations defence against a claim based on the *Statute of Elizabeth*) from its own prior decision in *Bowes* (which involved a claim based on a breach of a duty).[8] The Alberta Court of Appeal noted that it is "questionable" whether an action based upon the *Statute of Elizabeth* involves a "claim based on a breach of duty".[9] As such, the Court of Appeal held that it was not appropriate to grant summary judgment based on the alleged limitations defence.

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7 *Perry, Farley & Onyschuk v Outerbridge Management Ltd*, 2001 CarswellOnt 1564 (CA) at para 30 ("***Perry, Farley & Onyschuk***") **[Tab E]**.

8 *Milavsky v Milavsky*, 2011 ABCA 231 at paras 32-35 ("***Milavsky***") **[Tab F]**.

9 *Milavsky, ibid*, at para 33.

10. While this issue has not been definitively ruled upon by Alberta courts,[10] the plain language of the *Limitations Act* supports the conclusion that an application or action seeking relief under the *Fraudulent Preferences Act* is not subject to the *Limitations Act*.

11. In *Titan Investments*,[11] for example, this Court granted an order under the *Fraudulent Preferences Act* requiring the "winners" in a Ponzi scheme to repay their winnings to the debtor's estate for distribution to creditors. The order granted in *Titan Investments* was not based on any alleged breach by the "winners" of any duty, nor did it award damages against the "winners" for the violation of any right. As the definition of "remedial order" contemplates a failure of the defendant to comply with a duty or an obligation to pay damages for the violation of a right, the *Fraudulent Preferences Act* order made in *Titan Investments* could not be a "remedial order".

12. Further, the limitation period set out in section 3(1)(a) of the *Limitations Act* cannot commence until the claimant discovers that the injury is attributable to the conduct of the defendant. This language presupposes that the defendant has breached a duty owed to, or violated a right of, the claimant. In an application or action based on the *Fraudulent Preferences Act*, however, it is not the transferee that is alleged to have breached a duty, but the transferor.

13. In this case, the Receiver does not allege that the Net Winners have breached any duty owed to the creditors of the Debtors. Rather, the Receiver asserts that the Debtors have breached their duty to pay their creditors and, subject to the results of the Clawback Calculation,

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[10] See the discussion of this issue in MA Springman, George R Stewart & JJ Morrison, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto: Thomson Reuters Canada Limited, 2009) (loose-leaf updated 2018, release 8), ch 5 at 5-14.6 to 5-16 **[Tab G]**.

[11] *Re Titan Investments Limited Partnership, (Judicature Act)*, 2005 ABQB 637 ("***Titan Investments***") **[Tab H]**.

the Receiver asserts that transactions by which property was transferred by the Debtors to the Net Winners are void.

14. As such, the Clawback Judgments would, if granted, declare that such transactions are void pursuant to the *Fraudulent Preferences Act*. In this respect, such an order falls within the exclusion for declarations set out in paragraph (i) of the definition of "remedial order".

15. As has been observed in *The Law of Declaratory Judgments*, a creditor "may through the use of the declaratory judgment attack injurious transactions on the ground of fraud."[12] Orders made under the *Fraudulent Preferences Act* almost invariably include an express declaration that the impugned transaction is void.[13]

16. The Receiver is, of course, not simply seeking to obtain a declaration – the Clawback Judgments would also compel the Net Winners to return their winnings to the Debtors' estate for the benefit of the creditors. The Receiver recognizes that the *Limitations Act* cannot be circumvented by simply attaching a request for a remedial order to a request for a declaration.[14] In this context, however, the consequential relief (ordering the repayment of the winnings to the Debtors' estate) also falls outside of the definition of a "remedial order" because it is the "enforcement of a remedial order" as set out in paragraph (ii) of the definition of "remedial order".

17. The remedial order being enforced here is the Receivership Order which authorizes the Receiver to take possession of all of the Debtors' property for the benefit of all of their

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[12] Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2016) at 231 **[Tab I]**. See also: *Union Bank of Canada v Johnson* (1910), 13 WLR 519, 1910 CarswellAlta 37 (SC (TD)) **[Tab J]**.

[13] See, *e.g.*: *Environmental Refuelling Systems Inc v Dougan Senior*, 2018 ABQB 208 **[Tab K]**; *KOR Machining and Mechanical Ltd v KOR Welding and Machining Inc and SICO Welding and Fabrication Inc*, 2017 ABQB 290 **[Tab L]**; *508072 Alberta Ltd v Bullard*, 2008 ABCA 113 **[Tab M]**.

[14] See, *e.g.*: *Champagne v Sidorsky*, 2018 ABCA 394 **[Tab N]**.

creditors. To the extent that such property is in the hands of the Net Winners (and came to be so because of transactions that are declared to be void), an order compelling those Net Winners to return the funds to the Debtors' estate is in the nature of the enforcement of a remedial order and is not subject to the *Limitations Act*.

18. Although this issue does not appear to have been conclusively ruled upon, this Court has acknowledged that using an original judgment "as the basis for a fraudulent conveyance claim might be the enforcement of the judgment, even though it involves a new party. That kind of application is often brought within the original proceeding."[15]

19. As an example, under Rule 9.24 of the *Rules of Court*, an order compelling the sale of property (but not a money judgment) may be issued to pay an amount to be collected under a writ of enforcement where a judgment creditor claims to be entitled to relief under the *Fraudulent Preferences Act*.[16] Rule 9.24 is set out in Division 4 (Enforcement of Judgments and Orders) of Part 9 (Judgments and Orders) of the *Rules of Court*.

20. Indeed, outside of formal insolvency proceedings, the proceeds recovered in a *Fraudulent Preferences Act* procedure by a creditor must, under section 11(3) of that Act, be distributed by the plaintiff to the creditors under the *Civil Enforcement Act*, RSA 2000, c C-15. Reading the *Limitations Act* together with the *Rules of Court* and the *Fraudulent Preferences Act* thus reinforces the enforcement nature of an order made under the *Fraudulent Preferences Act* for limitations purposes.

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[15] *Domenic Construction Ltd v Primewest Capital Corp*, 2019 ABQB 58 at para 117 **[Tab O]**.

[16] *Alberta Rules of Court* ("***Rules of Court***"), Alta Reg 124/2010, r 9.24 **[Tab P]**.

21. Similarly here, a remedial order has been made (the Receivership Order) which the Receiver intends to enforce using the means of a fraudulent preference claim. The key fact here is that the Debtors were unquestionably sued within the relevant limitation period in respect of the injuries that the Debtors caused to their creditors. As noted by the Alberta Law Reform Institute, "an enforcement order will not be issued unless the initial claim was brought within the prescribed limitation period. The objective of the Act, which is to ensure that claims requesting remedial orders are brought within a reasonable time, will therefore have been satisfied."[17] As the Debtors have been sued within the limitation period, persons who have received funds from the Debtors as a result of void transactions cannot, on the basis of the *Limitations Act*, resist an enforcement process intended to recoup such funds.

(c) No Limitation Period under the *Limitations Act* has Commenced or Expired

22. The Receiver submits that, if the Clawback Judgments would be "remedial orders" and the *Limitations Act* does apply to the Receiver's attempt to recover funds from the Net Winners, then the relevant limitation period has not commenced or expired. The relevant limitation period under section 3(1)(a) of the *Limitations Act* can only commence when, among other things, the Receiver discovers that the injury is attributable to the conduct of the defendant and that the injury warrants bringing a proceeding. As the potential respondents/defendants (the Net Winners) have not been identified, and the potential liability of any defendants has not even been roughly calculated, the limitation period cannot have commenced. The limitation period will only begin to run when the Receiver completes the Clawback Calculation, which it is currently seeking Court permission to perform.

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[17] ALRI Limitations Report, *supra* note 6, at 53-54 **[Tab C]**.

Section 3(1) of the *Limitations Act*

23. Section 3(1) of the *Limitations Act* provides as follows:

> **3**(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

24. Courts in Alberta have consistently held that all three criteria set out in section 3(1)(a) must be satisfied before the limitation period starts running. In other words, the date by which a remedial order must be sought is two years from when the claimant knows or ought to know that "the last of these three criteria [have] been met."[18]

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[18] *Tran v Kerr*, 2014 ABCA 350 at para 39 ("***Tran v Kerr***") [emphasis in original] **[Tab Q]**.

Discoverability is Based on the Receiver's Knowledge

25. In a receivership context, the receiver is the "claimant" (i.e., the person who seeks a remedial order).[19] Therefore, it is the knowledge of the Receiver that can trigger the commencement of the limitation period.

26. As an example, in *Golden Oaks*,[20] a case involving the appointment of a receiver and trustee in bankruptcy regarding the perpetrators of a Ponzi scheme,[21] the Ontario Superior Court of Justice held that the limitation period did not commence until after the receiver and trustee in bankruptcy had completed its investigation:[22]

> In a case like this where a bankrupt has perpetrated fraud on creditors of a bankrupt estate prior to bankruptcy, the Trustee acting on behalf of the unsecured creditors must seek to recover those assets which were fraudulently used or transferred by the bankrupt. In doing so, the Trustee will have to conduct various investigations to see if there were fraudulent activities and how the assets were used and who received the benefit from their use. Once this is determined, the Trustee can then decide who has received the benefit of the fraud and by how much they benefitted. Then, the Trustee must determine the appropriate course of action to deal with those situations. It is only during the course of the investigation that the claims will become discoverable.

27. In *Golden Oaks*, the Ponzi scheme started in early 2010. The receiver was appointed on or about July 9, 2013 and the assignments in bankruptcy were filed on July 26, 2013. The receiver and trustee in bankruptcy (both were the same entity) completed its investigation on May 30, 2014 when it published its Fourth Report. It was only at that time that the receiver was

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19 See the definition of "claimant": *Limitations Act*, s 1(b).

20 *Golden Oaks Enterprises Inc (Trustee of) v MRL Telecom Consulting Inc*, 2016 ONSC 5322 ("***Golden Oaks***") **[Tab R]**. Note that *Golden Oaks* interpreted a different limitations statute than the limitations statute at issue in *Perry, Farley & Onyschuk*. Only under the former statute did the limitation period apply to fraudulent preferences.

21 *Golden Oaks*, *ibid*, at para 90.

22 *Golden Oaks*, *ibid*, at para 97.

able to confirm the unlawful transactions.[23] As a result, the Court found that "the discoverability clock ran from the time that the Fourth Report was prepared."[24] As the Statements of Claim alleging improper payments were issued by July 2015, the Court in *Golden Oaks* found that the claims asserted by the receiver were not statute-barred.[25]

28. In so holding, the Court in *Golden Oaks* rejected arguments that discoverability was based on the knowledge of the debtors, an argument advanced by the defendants on the ground that the trustee in bankruptcy was a successor to the debtors by reason of section 71 of the *BIA*[26] and for the purposes of section 12 of the Ontario limitations statute (which is analogous to section 3(2)(a) of the *Limitations Act*).[27]

29. Accordingly, in this case, any limitation period that may apply to the Receiver's potential application or action for the Clawback Judgments must be based on when the Receiver knows, or ought to know, that the relevant criteria in section 3(1)(a) of the *Limitations Act* are satisfied. Given the history of this estate, and given that the Clawback Calculation has not yet been performed, it is submitted that it is not possible that all three criteria in section 3(1)(a) of the *Limitations Act* have yet been satisfied.

30. It is worth noting, incidentally, that the Plaintiffs in the Terrigno Receiver Action claim that the limitations period has expired simply because the claims against the prospective Net Winners – whose identities are currently unknown – were "discoverable" before October 13, 2015,

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[23] *Golden Oaks*, *ibid*, at para 132.

[24] *Golden Oaks*, *ibid*, at para 133.

[25] *Golden Oaks*, *ibid*, at para 134.

[26] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***") **[Tab S]**.

[27] *Golden Oaks*, *supra* note 20, at paras 58-62 **[Tab R]**.

i.e., before the Receiver was appointed. So the Plaintiffs ignore the fact that "discoverability" is related to when the Receiver is appointed, and completely ignore the additional requirements of sections 3(1)(a)(ii) and 3(1)(a)(iii), which are as critical to the analysis as the "discoverability" issue in section 3(1)(a). These elements of the test will be discussed next.

To Trigger the Limitation Period, the Injury Must Warrant Bringing a Proceeding Against Identified Defendants

31. Courts in Alberta have consistently held that, although perfect certainty as to the section 3(1)(a) criteria is not required to commence a limitation period, mere suspicion will not suffice. Thus, for example, in *Alliance Pipeline*, this Court held that "[m]ore than suspicion is required. The [claimant] must have had, or could with reasonable diligence have discovered, some evidentiary support for that suspicion."[28]

32. In the context of fraudulent transactions, the satisfaction of the second criterion to trigger the limitation period (knowledge that the injury was attributable to conduct of the defendant) is based on when the involvement of that particular defendant is discoverable through the exercise of reasonable diligence. In other words, it is insufficient for the claimant to know that a fraud occurred or that an injury was suffered because of that fraud. As noted by the Ontario Superior Court of Justice in *Masales v Cole*:[29]

> The discoverability of a claim for relief involves the identification of the wrongdoer and also the discovery of his or her acts or omissions that constitute liability … . It is not enough that the plaintiff has suffered a loss and has knowledge that someone might be responsible; the identity and culpable acts of the wrongdoer must be known or knowable with reasonable diligence … .

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[28] *Alliance Pipeline Ltd Partnership v CE Franklin Ltd*, 2007 ABQB 582 at para 14 **[Tab T]**.

[29] *Masales v Cole*, 2016 ONSC 763 at para 61 [citations omitted] **[Tab U]**.

33. In *Tran v Kerr*, for example, the Alberta Court of Appeal held that the limitation period to sue a lawyer, who was alleged to have failed in his duty to protect the plaintiff from a mortgage fraud scheme, commenced when the plaintiff knew or should have known that the lawyer had breached his duty and not when the plaintiff knew that she had been defrauded.[30] A similar analysis was used to reject a limitations argument advanced by TD Bank in *Stanford International*.[31]

34. Not only must the identity of the defendant be reasonably discoverable to trigger the limitation period, it must be reasonably discoverable that the injury warrants bringing a proceeding. While, again, perfect quantification is not needed, a cost-benefit analysis must be undertaken. This is, of course, impossible before the amount recoverable from any particular defendant has yet to be even roughly calculated. Such a cost-benefit analysis is, it is submitted, even more important where the prospective Plaintiff is a Court-appointed Receiver who has the duty to treat all stakeholders with an even hand, not use estate funds improvidently, and balance a myriad of competing interests. As the Alberta Court of Appeal noted in *Boyd v Cook*:[32]

> There might be a number of things which might mean that a lawsuit for an undoubted injury caused by a defendant would not be warranted. We will not attempt any exhaustive list. But one is obvious, and is the only one argued here. Some lawsuits are, or appear to be, uneconomical. The likely legal fees and disbursements may be less than the likely recovery. Maybe a big risk of paying costs to the other side is also relevant. And sometimes the amount of work which the plaintiff would have to put into the suit and preparing for it would be undue in relation to the likely recovery.

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30 *Tran v Kerr*, *supra* note 18, at para 43 **[Tab Q]**.

31 *Stanford International Bank Ltd v Toronto-Dominion Bank*, 2015 ONSC 6900 ("***Stanford International***") **[Tab V]**.

32 *Boyd v Cook*, 2013 ABCA 27 at para 13 **[Tab W]**.

35. Here, the Receiver has yet to identify any potential defendants as being potentially liable for anything. As such, neither the second nor the third criteria set out in section 3(1)(a) of the *Limitations Act* has been satisfied. The receivership in this case has been plagued by difficulties in obtaining the necessary information and funds that would allow the Receiver to carry on its work and, most importantly for this issue, to perform the Clawback Calculation. As recently as March 5, 2019, the Receiver has continued its attempts to obtain missing bank statements from BMO,[33] and the Receiver's review indicates that it is missing more than 40 bank statements.[34] Further, the funds needed to perform the Clawback Calculation have only recently become available for this purpose as the Receiver had to first determine what portion of the sale proceeds were required to satisfy existing obligations of the estate.[35]

36. For these reasons, it would be unreasonable to expect that the Receiver has already discovered the requisite facts to advance a claim for the Clawback Judgments. It would be ridiculous to presume that the limitations period has expired because the action against Net Winners was "discoverable" before October 13, 2015. As the Supreme Court of Canada noted in *Peixero*, "discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it."[36] Accordingly, the Receiver requests that this Court declare that any applicable limitation period regarding the Receiver's attempt to recover funds from the Net Winners has not commenced or expired. The Receiver will then be able to undertake the

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[33] Eighth Report, at para 18(g).

[34] Eighth Report, at para 43.

[35] For example, the dispute regarding the payment, from the estate, of costs incurred by Mr. Mike Terrigno and Easy Loan Corporation was only resolved in January 2019, and the order approving the fees of the Receiver and its counsel, as set out in the Seventh Report (much of which relate to work performed after the sales proceeds were received), was made in January 2019.

[36] *Peixeiro v Haberman*, [1997] 3 SCR 549, 1997 CarswellOnt 2928 at para 36 **[Tab X]**.

difficult and expensive work of preparing the Clawback Calculation, and proceed, with direction from this Honourable Court as necessary, to recover the "winnings" for the benefit of the estate and its creditors.

B. The Enforcement Procedure Issue

37. The Receiver seeks clarity at this stage as to the procedure that is to be followed in any attempt by the Receiver to recover funds from the Net Winners for the benefit of all of the Debtors' creditors. The Receiver submits that it would be appropriate and cost-effective to proceed by way of a Titan Order Application to obtain judgment against some or all of the Net Winners, rather than commence multiple actions against the various Net Winners. In the alternative, if this Court considers it more appropriate for the Receiver to commence multiple actions, then the Receiver seeks the Court's permission to commence the Enforcement Actions against the Net Winners. Of course, in either case, the Receiver proposes to proceed after the Clawback Calculation has been performed and after the conclusion of a claims process authorized by this Court.

The Titan Order Application

38. The leading case in Alberta regarding the recovery of "winnings" from a Ponzi scheme is this Court's decision in *Titan Investments*.[37] In *Titan Investments*, the receiver of a limited partnership applied for an order declaring that payments to the "winners" of a Ponzi scheme were void as fraudulent preferences and directing such "winners" to repay their "winnings". After analyzing the particular facts of that case, the Court issued a declaration that the payments to the "winners" were void as fraudulent preferences. Further, the Court directed the "winners" to repay

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[37] *Titan Investments*, *supra* note 11 **[Tab H]**.

the full amount of the payments to the receiver for distribution among the creditors as a group. This approach is consistent with section 11(2) of the *Fraudulent Preferences Act*, which provides that the "right of seizure and recovery exists in favour of all creditors of the debtor."

39. It should be noted that the "winners" in *Titan Investments* were not named parties to that action (Court File No. 1401-19905), and based on a review of the procedure card for that action, it is evident that the Court issued judgments and writs of enforcement against approximately 35 of the "winners".[38] This approach is consistent with the Receiver's position that the Clawback Judgments, to the extent that they compel repayment of the "winnings" in this Ponzi scheme, are in the nature of enforcement of a remedial order in the present action and not remedial orders in and of themselves.

40. The *Titan Investments* approach of issuing judgment against a non-defendant is supported by other Alberta precedent. In *Krumm v McKay*, certain transfers made to Donald and Margaret McKay (the "**McKays**") were held to be fraudulent and void under the *Fraudulent Preferences Act* as well as the *Statute of Elizabeth*. Donald McKay was not a named defendant in that action. With respect to a shop building owned by a corporate defendant (transferor) and sold by the McKays for $48,981 (for their own benefit), the applicant sought "a declaration that the transfer of the shop building is fraudulent, and that the [a]pplicant is entitled to recover the proceeds of disposition from the McKays."[39] Although no sale of the shop building was ordered under the equivalent of Rule 9.24, and even though the transferred shop building was no longer held by the McKays, this Court held that the applicant was "entitled to recover the proceeds of the transfer of the shop building against the McKays by virtue of Section 11 of the *Fraudulent*

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[38] Alberta Court of Queen's Bench Procedure Record, Court File No. 1401-19905 **[Tab Y]**.

[39] *Krumm v McKay*, 2003 ABQB 437, at para 11 ("***Krumm v McKay***") **[Tab Z]**.

Preferences Act" and gave "judgment in the amount of $48,981 against the McKays for the benefit of creditors" of the relevant corporate defendant.[40] As a result, judgment was issued against Donald McKay, who was a recipient of the fraudulent transfers, but who was not a defendant in the action.

41. The *Rules of Court* also support the proposition that a person who is not named as a party to an action can, for enforcement purposes, be made subject to an order in respect of the action. Rule 9.19(b) provides that if a person is not a party to an action but "the person is subject to a judgment or order granted in respect of that action, the judgment or order may be enforced against the person in the same manner as if the person were a party to the action." This provision, which is included in Division 4 (Enforcement of Judgments and Orders) of Part 9 (Judgments and Orders), clearly contemplates that a non-party to an action may become subject to an enforcement order granted in that action.

42. The Receiver further submits that this situation is distinguishable from that in *336239 Alberta*, a case in which this Court rejected an argument that Rule 9.24 of the *Rules of Court*, which applies only to an order that property or part of property be sold, can be used to obtain judgment personally against a non-party.[41] In *336239 Alberta*, a judgment debtor (Francis Mella) deposited funds to a bank account that he opened in the name of his wife (Olena Afonska). Such deposits were, with small exceptions, made for his own or his companies' benefit and nearly all of the funds were paid out by Mr. Mella or his businesses to pay creditors and expenses. The plaintiff in that case attempted to rely on Rule 9.24 to obtain judgment against Ms. Afonska personally. This Court rejected the plaintiff's argument because Rule 9.24 only allows an order

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[40] *Krumm v McKay*, *ibid*, at para 45 and Conclusion, para 6.

[41] *336239 Alberta Ltd v Mella*, 2016 ABQB 190 ("***336239 Alberta***") **[Tab AA]**.

for the sale of property that was fraudulently conveyed but does not permit summary judgment against the non-party that received the property.

43. The Receiver does not intend to rely on Rule 9.24 to obtain a sale order. The Receiver intends to rely instead on this Court's jurisprudence in *Titan Investments* and *Krumm v McKay*, together with section 11 of the *Fraudulent Preferences Act*, to obtain an enforcement order requiring the payment of funds by non-defendants that received funds in void transactions. It would serve no useful purpose to require the Receiver to incur the very significant expense of commencing a number of separate actions to pursue the Net Winners when those persons can be treated in a procedurally fair manner by putting them on notice of the claims process and the Titan Order Application. Therefore, this Court should permit the Receiver to make a Titan Order Application to obtain the Clawback Judgments against some or all of the Net Winners.

44. It is the Receiver's intention that once the Clawback Calculation is complete (and assuming of course that this Court permits the Receiver to proceed by way of a Titan Order Application) the Receiver would bring an application to establish a process (the "**Net Winners Claims Process**") by which the Net Winners are identified, the quantum owing to the estate by each of the Net Winners would be finally determined, and those amounts be required to be repaid to the estate. Broadly speaking, the Receive anticipates that the Net Winners Claims Process (which would be established by subsequent application by the Receiver) would look something like this:

(a) The Net Winners and the quantum of their winnings are identified in the Clawback Calculation;

(b) The Receiver would provide the Clawback Calculation to those persons who are identified as Net Winners, together with a Court-approved form of notice to those

person advising that they have been identified as Net Winners, and setting out the quantum of their winnings as identified by the Receiver;

(c) If they should elect to do so, each of the persons identified as Net Winners in the Clawback Calculation would have a period of time (as established by the Court-approved procedure) (the "**Net Winners' Appeal Period**") to file an application with the Court, supported by such affidavit evidence as the Net Winner may consider appropriate, to dispute their status as Net Winners, or to dispute the alleged quantum of their winnings, or both; and

(d) Any person who is identified as a Net Winner in the Receiver's Clawback Calculation who fails to file such an application within the Net Winners' Appeal Period, shall (subject to further Order of the Court):

(i) be conclusively deemed to be a Net Winner;

(ii) be conclusively deemed to be indebted to the estate in the amount shown in the Clawback Calculation; and

(iii) have 30 days (or such other period of time as the Court may direct) to repay such indebtedness to the Receiver, failing which the Receiver shall be granted judgment against such Net Winner and be immediately entitled to enforce such judgment.

45. Of course, the Receiver would also need to establish a claims process to establish who the Net Losers of the estate are, which process could be similar to the foregoing or could be the claims process established under the *Bankruptcy and Insolvency Act* (assuming of course that one or both of the Debtors are assigned into bankruptcy). But such a claims process would

necessarily be subsequent to the establishment of the Net Winners Claims Process, and would only be necessary once the Receiver has realized recoveries which would result in distributions to any estate creditors.

The Enforcement Actions

46. If this Court finds that it would not be appropriate to pursue the Net Winners through the Titan Order Application, the Receiver submits, in the alternative, that it should be permitted to commence one or more Enforcement Actions naming the Net Winners as defendants.

47. This is what occurred in the recent Samji Group Ponzi scheme in British Columbia, where the trustee commenced actions against persons it determined to be "winners" of the Ponzi scheme. As the British Columbia Supreme Court observed in the trial decision in *Whitmore*, requiring the recipient of fraudulent "winnings" to repay such "winnings" serves the salutary purpose of putting prospective investors on notice that due diligence is required where "off the books" transactions which appear too good to be true are being considered.[42] Moreover, as noted above, any funds recovered by the Receiver pursuant to the Clawback Judgments would be for the benefit of the Debtors' creditors as a group, thus resulting in a more equitable distribution of the loss that has resulted from this fiasco.

48. Of course, this route would require the Receiver to commence a multitude of separate actions against separate persons who are identified as Net Winners in the Clawback Calculation, and the full litigation process would be engaged in each action. The Receiver submits

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[42] *Boale, Wood & Company Ltd v Whitmore*, 2017 BCSC 1917 at para 125 ("***Whitmore***") **[TAB BB]**.

that this option is therefore far less efficient and desirable given the significantly greater expense and delay that would be entailed.

C. The Exclusive Enforcement Issue

49. Whether or not the Receiver is permitted to perform the Clawback Calculations or attempt to obtain the Clawback Judgments, the Receiver submits that the ability to make a Titan Order Application or commence or continue any Enforcement Actions is exclusive to the Receiver. If the Receiver is able to pursue the Clawback Judgments, then a multiplicity of proceedings affecting the Debtors' property, and an interference with the Receiver's actions, would arise if anyone else were permitted to pursue equivalent relief. If the Receiver is not able to pursue the Clawback Judgments, it is submitted that no one else should permitted to do so (subject to further Order of this Court), because any such attempt by the creditors to obtain Clawback Judgments would be contrary to the Receivership Order. In any event, the Receiver, as an officer of this Court, is in the best position to act impartially for the benefit of all creditors. It would be improper to allow a competing or alternative receivership process to be carried on by any subsets of creditors.

50. The starting point for the analysis is the Receivership Order (as amended) which provides, at paragraph 9, that no proceeding "against or in respect of the Debtor or its Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court …". Such a stay is necessary to achieve the benefits of a receivership for all creditors, which include "the avoidance of a multiplicity of proceedings, an orderly approach to liquidation, and the appointment of an officer of the court to carry out the liquidation in an impartial manner."[43]

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[43] *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 at para 58 **[Tab CC]**.

51. This Court has explicitly held that property recovered using the *Fraudulent Preferences Act* belongs to the creditors as a collective. In *Taylor & Associates*, this Court cited section 11(2) of the *Fraudulent Preferences Act* as support for its holding that "[p]roperty or proceeds of property recovered under the [*Fraudulent Preferences Act*] belong to all creditors, and not merely the party or parties who initiated the [*Fraudulent Preferences Act*] procedure".[44]

52. As noted in paragraph 20 above, outside of formal insolvency proceedings, and pursuant to section 11(3) of the *Fraudulent Preferences Act,* the proceeds recovered by a creditor using the *Fraudulent Preferences Act* must be distributed by the plaintiff to the creditors following the rules provided by the *Civil Enforcement Act*, RSA 2000, c C-15. However, this procedure cannot be followed where, as here, a receivership order has imposed a stay of proceedings in respect of the debtor's property.

53. Further, the *Fraudulent Preferences Act* must, under section 12 of that Act, be read and construed subject to the *BIA*. (The Receiver notes that, as of the date of writing of this Brief, its application for leave to assign the Debtors into bankruptcy has not yet been heard.) Section 69.3 of the *BIA* provides that, on the bankruptcy of a debtor, "no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy." In a bankruptcy process, no creditor is permitted to attempt to circumvent the process to attempt to recover their claims, which are provable in bankruptcy, by commencing or continuing proceedings against other creditors under the *Fraudulent Preferences Act*. As a general rule, the stay of proceedings under section 69.3 of the *BIA* remains in effect until the trustee has been discharged.

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[44] *Taylor & Associates Ltd v Louis Bull Tribe No 439*, 2011 ABQB 213 at para 14 ("***Taylor & Associates***") **[Tab DD]**.

54. Moreover, section 71 of the *BIA* provides that upon an assignment being filed, the bankrupt's property immediately passes to and vests in the trustee named in the assignment. If the Net Winners have indeed received fraudulent preferences, then those transactions are subject to being declared void, which would result in the property being declared to be that of the Debtors. If creditors are permitted to advance their own actions under the *Fraudulent Preferences Act*, the result would be that the Clawback Judgments sought by creditors would be seeking recovery of funds that are properly vested in the Receiver (assuming that one or both of the Debtors are assigned into bankruptcy). This would certainly affect the Debtors' property and undermine one of the main goals of a bankruptcy process, which is to allow an orderly disposition of assets and administration of the estate in an impartial manner.

55. The analysis of the Alberta Court of Appeal in *Dorais*,[45] which was decided in a bankruptcy context, is instructive. Citing section 10 of the *Fraudulent Preferences Act*, the Court stated:

> Actions under the statute are brought on behalf of all creditors, not just the one prosecuting the action … . A declaration that one of the respondents holds property under a constructive trust would likewise accrue to the advantage of all the potential beneficiaries of that trust, which would be the general body of creditors: *Leard (Re)* (1995), 30 CBR (3d) 312 at para. 5 (Ont HC).
>
> One of the core duties of a trustee in bankruptcy is to gather in the assets of the bankrupt. The Havelock and Metz claims seek, in part, declarations that certain transfers of assets from the bankrupts to the respondents are void. If those claims are successful, those assets would revert back to the original owner, not to the individual plaintiffs seeking the declaration. Neither the Havelock nor the Metz plaintiffs would receive any preferential payment or treatment. If the respondents do in fact hold property in trust for one or more of the bankrupt companies, the Trustee has a duty to attempt to recover it. Prosecuting these types of claims on behalf of the general body of creditors is consistent with the Trustee's overall

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[45] *BDO Canada Ltd v Dorais*, 2015 ABCA 137 ("***Dorais***") [emphasis added] **[TAB EE]**.

> duties. In that respect he is pursuing legitimate claims of the estates, and is not impermissibly "stepping into the shoes" of individual plaintiffs.[46]

56. Pursuant to paragraphs 3(f) and 3(j) of the Receivership Order, the Receiver may pursue the Clawback Judgments on behalf of the Debtors' estate under the *Fraudulent Preferences Act*. It would interfere with the Receiver's attempt to recover funds using this method if individual creditors are permitted to do the same thing. As with the Clawback Actions, which were stayed pursuant to an order of this Court pronounced on January 23, 2019, any future actions by anyone other than the Receiver seeking Clawback Judgments should be stayed, but in this case, pre-emptively.

57. The stay preventing Clawback Judgments from being pursued by anyone other than the Receiver should, in the Receiver's submission, apply up to the discharge of the Receiver and afterwards, subject to further order of this Court. If, due to a lack of funding, the Receiver is unable to perform the Clawback Calculation or otherwise take steps to pursue the Clawback Judgments, attempts by individual creditors to obtain Clawback Judgments against other individual creditors without Court supervision would likely lead to a multiplicity of actions, a waste of the Court's resources, potentially inconsistent judgments, and an unjust allocation of the loss created by the Ponzi scheme.

58. If a Clawback Calculation is to be performed and enforced, it is necessary for an impartial and Court-supervised official to do so regarding all of the Net Winners and all of the Net Losers at the same time, in one process. The likely alternative, including in a post-discharge scenario, is that numerous individuals claiming to be Net Losers will sue other investors (or alleged investors) in multiple actions in which the alleged Net Losers will assert that those other investors

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[46] *Dorais*, *ibid*, at paras 12-13.

are Net Winners. This situation will put the Court in an untenable situation of potentially making contradictory judgments in different actions on the basis of calculations performed by different plaintiffs. As such, this Court should make an order that, if the Receiver is unable to pursue the Clawback Judgments, then no-one else is permitted to do so, subject to further order of this Court.

D. Conclusion

59. Accordingly, the Receiver seeks advice and direction pursuant to section 25 of the Receivership Order regarding the Limitations Issue, the Enforcement Procedure Issue, and the Exclusive Enforcement Issue, and respectfully makes the following recommendations:

(a) That this Court declare that any applicable limitation period under the *Limitations Act* for the Receiver to seek the Clawback Judgments, in accordance with a procedure established by this Court in the within Application, has not commenced and has not expired;

(b) That this Court grant leave to the Receiver: (i) to make the Titan Order Application to obtain judgment against some or all of the Net Winners disclosed by the Clawback Calculation; or (ii) in the alternative, to commence one or more Enforcement Actions in a Court of competent jurisdiction against some or all of the Net Winners; and

(c) That this Court declare that, subject to further Order of this Court, including an Order discharging the Receiver, any actions against any Net Winners in the within receivership proceeding, pursuant to the *Fraudulent Preferences Act*, or otherwise, are actions which can be advanced only by the Receiver, and therefore, neither a

Titan Order Application nor any Enforcement Actions may be commenced by any person other than the Receiver except with leave of this Court.

RESPECTFULLY SUBMITTED THIS 20th day of March, 2019

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